STATE OF MICHIGAN

IN THE SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, GREATER MICHIGAN CHAPTER, a Michigan Non-Profit Corporation,	Supreme Court Docket No. 149622
Plaintiff/Appellant,	Court of Appeals Docket No. 313684
v.	Lower Court Case No. 12-000406-CZ
CITY OF LANSING,	
Defendant/Appellee,	

BRIEF *AMICUS CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER SUPPORTING PLAINTIFF-APPELLANT ASSOCIATED BUILDERS AND CONTRACTORS

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STATEMENT OF QUESTIONS INVOLVED

In 1923, this Court issued its decision in *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923), holding that municipalities may not regulate matters of state concern, and that—for this reason—charter cities lack the power to regulate matters of labor and employment law. Two of the questions presented are:

(1) Whether *Lennane's* holding—that municipalities may not regulate matters of *state concern*—remains good law in Michigan?

(2) Whether this Court should affirm or overturn *Lennane's* specific holding that municipalities lack the power to regulate matters of labor and employment law?

INTEREST AND IDENTITY OF AMICUS CURIAE

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm, which was established to provide legal resources and to be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, including nearly 10,000 independent businesses in Michigan. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American

small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. *Amicus* files in this case because it raises an important question of state law concerning the scope of powers conferred by the People of Michigan to charter cities. Because this question concerns the fundamental allocation of political power within the state, it is an issue of grave concern to all Michiganders. Small business owners, whose rights may be endangered to the extent this Court should pronounce charter cities are vested with a wholesale police power—coextensive with the state's regulatory powers, have special concerns. Given that the small business community represents a political minority in most municipal jurisdictions, business owners have legitimate concerns that—if vested with such broad and indefinite powers—charter cities can and will adopt burdensome regulatory regimes that will make it more difficult to grow or maintain business operations.

Specifically, *Amicus* NFIB Legal Center is concerned that, if this Court should overturn *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923), charter cities would be enabled—for the first time in Michigan history—to adopt heightened labor and employment law standards in a manner that would disrupt Michigan's existing unified system of regulation. This is troublesome to the small business community because it would likely result in the balkanization regulatory standards—which would seriously complicate business operations for many companies, and would effectively establish heightened regional standards—at least for companies with mobile workforces.

On a more fundamental level, Michigan's small business community has an interest in this case in so far as the decision may affect the overall business climate. Small businesses throughout the state have a real interest in ensuring that Michigan remains competitive with other

Midwestern states, and with the rest of the country. And because a decision to overturn *Lennane* opens the door for balkanization of labor and employment standards throughout Michigan, the small business community is concerned such a decision may well result in economic dislocation—as multifarious regulatory standards are likely to drive businesses to invest or relocate elsewhere.

INTRODUCTION

Because review was granted on the question of whether *Lennane* should be overruled, *Amicus* NFIB Legal Center focuses on the doctrine of *stare decisis* in this filing. At its heart, the doctrine counsels against upsetting settled societal expectations. This is because the doctrine respects the great virtue of our common law system—*i.e.* its predictive value in allowing private and public actors to order their business in reliance on established legal principles. Indeed, the doctrine of *stare decisis* rightly affords great deference, and requires comity, toward previous judicial panels in order to preserve the solemnity of the judicial institution and her rulings. As such, the doctrine strongly militates against upsetting the *status quo*, especially in situations where—as in the present case—the original decision was rightly decided, or at least a "close call."

Amicus maintains that *Lennane* was rightly decided. But, more importantly, *Amicus* files here out of concern over the sea change that would result if this Court should overturn *Lennane* after nearly a century of legislative acquiescence. The result would fundamentally change the scope of power conferred to charter cities and would have serious, negative, statewide public policy implications. Indeed, if this Court should reverse course now—permitting charter cities to regulate matters of labor and employment law—one can expect municipalities to proliferate a multitude of competing regulatory regimes, seriously complicating legal issues that businesses must wrestle with on a daily basis.

There can be no question that this proposed departure from unitary statewide regulatory policies is *in itself* raising an issue of statewide concern. To be sure, the prospect of balkanized labor and employment standards—across a patchwork of local municipalities—raises serious questions about potential adverse impacts for Michigan's economy and business climate. The

doctrine of *stare decisis* properly acknowledges that the Legislature is better suited to weigh the competing political, social and economic concerns here. Accordingly, this Court should affirm *Lennane* and leave it to the Legislature to decide whether the time has come to change course.

ARGUMENT

I. Municipal Powers are Not Coextensive With the State's Police Powers.

A. This Court Should Reverse the Court of Appeals.

It is elementary that an intermediate appellate court lacks the power to overrule a decision of a court of last resort, like the Michigan Supreme Court. Regardless of whether a case was decided last year, or in a previous century, a prior decision of the Michigan Supreme Court remains binding precedent for lower courts. *Lubertha Ratliff v General Motors Corp*, 127 Mich App 410, 416-17; 339 NW2d 196 (1983). A prior decision of this Court can only be revisited and explicitly overturned by this Court after carefully weighing the doctrine of *stare decisis*, which holds that existing precedent must be affirmed—except upon a showing of compelling reasons for upsetting settled law. See, e.g., *Dean v Chrysler Corp*, 434 Mich 655, 664; 455 NW2d 699, 703 (1990) (affirming that "stare decisis 'is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in by the legislature, by its continued use or failure to change the language of the statute so construed, the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature.'"). The only other ways that an existing precedent can be invalidated—at the state level—is through legislative action or a constitutional amendment *unequivocally* changing Michigan's legal landscape.[1]

[1] "It has long been recognized that where this Court has given an interpretation to a statute with no reaction from the legislature… it may be assumed there is legislative acquiescence in the statute's meaning. Even more persuasive is the rule that where the *basic provisions* of a statute

As such, *Amicus* NFIB Legal Center agrees with Petitioner, Associated Builders and Contractors (ABC), that the Court of Appeals violated an essential precept of Anglo-American law in ruling that *Attorney General, ex rel Lennane v Detroit*, 225 Mich 631; 196 NW 391 (1923), is no longer binding. In his dissent, Judge Sawyer aptly noted that this Court has never reversed *Lennane* and there has been no clear legislative or constitutional change that should render the opinion invalid. *Associated Builders and Contractors v City of Lansing*, 305 Mich App 395, 420-21; 853 NW2d 433 (2014) (Sawyer, J, dissenting) (repudiating the argument that this Court has since backed away from *Lennane* and explaining that—far from pronouncing that charter cities have a general police power—*People v Sell*, 310 Mich 305; 17 NW2d 193 (1945), affirmed *Lennane's* fundamental holding that "cities possesses such broad police powers [only] within the area of authority granted to them by the Constitution or statutes."). Indeed, the pertinent language from the 1908 Constitution was re-adopted *without change* in the 1963 Constitution.[2] The pertinent statuary language also remains in effect.[3] In each instance, the scope of power conferred is cabined by the requirement that the municipal regulations must bear

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have been construed by the courts and these provisions are subsequently reenacted by the legislature, it may be assumed the legislature acted with knowledge of the Court's decisions and that the legislature intended the re-enacted statute to carry the Court's interpretation with it." *Smith v City of Detroit*, 388 Mich 637, 650-51; 202 NW2d 300 (1972) (emphasis added) (citations omitted).

[2] Compare Mich Const 1908, Art 8, § 21 (conferring authority upon "the electors of each city and village … to pass all laws and ordinances *relating to its municipal concerns*, subject to the Constitution and general laws of this state.") (emphasis added) with Mich Const 1963, Art 7, § 22 ("Each such city and village shall have power to adopt resolutions and ordinances *relating to its municipal concerns*, property and government, subject to the constitution and law.") (emphasis added).

[3] The Home Rule City's Act confers authority with the same textual limitation; charter cities may "pass all laws and ordinances *relating to its municipal concerns* subject to the constitution and general laws of this state." MCL 117.4j(3) (emphasis added). This is the same authorization that existed when *Lennane* was decided. See 1915 CL 3307(t).

a nexus to truly local concerns.

B. *Lennane* Affirmed an Axiomatic Principle: Home Rule Powers Are Contingent on the Scope of the Actual Authority Conferred.

A fundamental precept of the American system is that political sovereignty rests in the states, which ultimately represents the collective will of the people. See *Chisholm v Georgia*, 2 US 419, 471; 1 L Ed 440 (1793) (Jay, Chief J) ("[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State…"). Of course, the people maintain the prerogative to bestow certain powers on local municipalities; those conferred powers are derivative of the state's police powers. Vanlandingham, *Municipal Home Rule in the United States*, 10 Wm & Mary L Rev 269 (1968) ("In the absence of state constitutional provisions to the contrary, [local governments] are subject wholly to state legislative control.") (citing Dillon, *Commentaries On The Law Of Municipal Corporations*, § 237 (5th ed 1911). It is therefore axiomatic that municipalities are political subdivisions of the state, and that they have only those powers expressly conferred by the State Constitution and enabling statutes. *City of St. Louis v Western Union Tel Co*, 149 US 465, 467; 13 S Ct 990; 37 L Ed 810 (1893).

The people of Michigan have unmistakably conferred the power to "[e]ach such city and village . . . to adopt resolutions and ordinances relating to its municipal concerns. . . ." Mich Const 1963, Art 7, § 22. This grant of municipal power is admittedly vague. As the present dispute illustrates, these words could be interpreted so as to authorize regulation of any conceivable conduct within the geographical bounds of the city. Or they could be interpreted — more narrowly — in a manner that presumes the words were intended to conceptually limits the

universe of municipal regulation.[4] But, this issue was resolved long ago. In *Lennane*, this Court affirmed the more narrow interpretation—consistent with recognized doctrine in Michigan that those powers bestowed upon charter cities are not coextensive with the State's police powers. See *Clements v McCabe*, 210 Mich 207, 217; 177 NW 722 (1920) (partially superseded by statute) (acknowledging that the words are "very broad[,]" but refusing to proscribe to those "very general and indefinite words … [a] far reaching [grant of powers]….").

This holding is consistent with the approach taken by other home rule states, with similar grants of municipal powers. There are two common forms of home rule: (a) *imperio in imperium*,[5] and (b) legislative home rule. The former "denotes the original form of home rule, which envisioned two distinct spheres of local and statewide concerns and powers." Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 Denv U L Rev 1271, 1275 (2009); *see also* Vanlandingham, *supra* at 279 (defining this form of home rule as "the application of [federalism] principle[s] to the state-local relationship.") (citing McBain, *The Law And Practice Of Municipal Home Rule*, 109-110 (1916)). Under *imperio* home rule systems, local authorities are presumed only to have limited powers—but the state is also prohibited from interfering with truly local affairs. See *People ex rel Le Roy v Hurlbut*, 24 Mich 44, 98 (1871)

[4] Some states avoid these difficulties by clearly specifying that home rule units have been delegated the authority to enact law in any manner *not inconsistent* with state law. But where the conferral of home rule power is intentionally limited to authorize legislation only on matters of *purely local concern*, it is exceedingly difficult to precisely demarcate the sphere of authority conferred—that is unless the conferral simply enumerates specific authorizations of authority. Accordingly a grant of general authority over "local" or "municipal" matters is necessarily vague and inevitably requires courts to determine what issues are most appropriately viewed as local in nature, or of a broader statewide concern.

[5] The phrase *imperio in imperium* means: "A government, power, or sovereignty within a government, power or sovereignty." Merriam-Webster Dictionary, Imperium in Imperio, available online at http://www.merriam-webster.com/dictionary/imperium%20in%20imperio (last visited 03/03/15).

(Cooley, J). By contrast, "legislative home rule" systems assign a general police power to charter cities—therein enabling local jurisdictions to enact law in any manner that does not expressly or implicitly conflict with state law. See, e.g., *City of New Orleans v Bd of Com'rs of New Orleans Levee Dist*, 640 So2d 237, 243 (1994) (observing that there is model language available for states wishing to confer an unbounded police power to local authorities: "[a]… City may exercise any legislative power … not denied … by general law.") (quoting National Municipal League, Model State Constitution, § 8.02 (6th ed. 1963)). But, where a general police power is granted in this manner, the conferral is usually explicit. *See* Turrell, *Frack Off! Is Municipal Zoning A Significant Threat to Hydraulic Fracturing in Michigan?*, 58 Wayne L Rev 279, 286 (2012) ("Generally, legislative home rule is provided for in a constitutional amendment and incorporates language to the effect that 'a city may exercise any legislative power not denied by general law.'").

In the absence of such language, a conferral of home rule power is conceptually limited in scope. Indeed, "[t]ypical imperio language enables home rule units to legislate with respect to 'municipal affairs,' Cal Const, Art XI, § 5; or grants 'all powers of local self-government,' Ohio Const, Art XVIII, § 3; or grants powers over 'local affairs and government,' Wis Const, Art XI, § 3." Reynolds, 86 Denv U L Rev at 1302; *see also* Turrell, 58 Wayne L Rev at 286 (explaining that *imperio* home rule states "generally provide that local legislatures can legislate with respect to 'municipal affairs' or 'local affairs and government.'"). Michigan's conferral of home rule authority is consistent with these examples. As such, *Lennane* correctly held that charter cities are forbidden from regulating on matters of "state concern."

If the people had intended to confer a general police power, they would have included language clearly stating that municipal legislation is valid except when in conflict with state

law.[6] Without question, the Michigan Legislature knows how to include explicit language if it intends to depart from established law. See e.g., *Wesche v Mecosta Cnty Rd Com'n*, 480 Mich 75, 86; 746 NW2d 847 (2008) (observing "the Legislature knows how to create a statutory threshold when it wants to."). Thus, at any point over the past 92 years, the Legislature could have amended the Home Rule City Act to include such language if there was a popular desire to confer a general police power on charter cities in the wake of *Lennane*. *See Shepard v United States*, 544 US 13, 23; 125 S Ct 1254; 161 L Ed 2d 205 (2005) (explaining that "[c]onsiderations of stare decisis have special force in the area of statutory interpretation… [because the Legislature] remains free to alter what we have done.") (quoting *Patterson v McLean Credit Union*, 491 US 164, 172-173; 109 S Ct 2363; 195 L Ed 2d 132 (1989)).

In the absence of any such explicit amendment, Michigan remains an *imperio* home rule state. *See Rodriguez v United States*, 480 US 522, 524; 107 S Ct 1391; 94 L Ed 2d 533 (1987) (finding that "repeals by implication are not favored, … and will not be found unless an intent to repeal is clear and manifest.") (internal citations omitted). Of course, the difficulty may be in demarcating the line between subjects of municipal and statewide concern. But, *Lennane* was clear in holding that— wherever that line may be in other areas —matters of labor and employment law are definitively of state concern. As discussed below, this Court should not upset that precedent nearly a century later.

II. The Doctrine of Stare Decisis Strongly Militates in Favor of Affirming *Lennane*

Under stare decision, "*if a case was wrongly decided*, the Court should then examine

[6] "Some states following the NML [National Model League] model require[] that the legislature must expressly deny or prohibit, in order to override, a local government's particular exercise of legislative power." *City of New Orleans*, 640 So2d at 243 (emphasis in the original) (citing Mont Const, art XI, § 6 (1972); NM Const, art X, § 6 D (1970); Alaska Const, art X, § 11 (1956)).

reliance interests: whether the prior decision defies 'practical workability'[7]; whether the prior decision has become so embedded, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations; and whether the prior decision misread or misconstrued a statute." *Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197, 215; 731 NW2d 41 (2007) (emphasis added) (citing *Robinson v City of Detroit*, 462 Mich 439, 464-67; 613 NW2d 307 (2000)). As such, *Amicus* contends—as a threshold matter—that *Lennane* should be affirmed because it was either rightly decided, or because there is no compelling basis for assuming otherwise. But, to the extent *Lennane*'s rationale is called into question, all of the *stare decisis* factors weigh in favor affirmance.

A. There Are No Compelling Reasons for Overturning *Lennane*

There are undoubtedly occasions when existing precedent should be reexamined, and—for compelling reasons—repudiated. *See People v Gardner*, 482 Mich 41, 87; 753 NW2d 78 (2008) ("Stare decisis is not an ironclad mandate."). For example, *Amicus* NFIB Legal Center led a coalition, with thirteen organizations and six law professors, in a recent *amicus* filing, urging the U.S. Supreme Court to reconsider and overturn the infamous decision in *Kelo v New London*, 545 US 469; 125 S Ct 2655; 162 L Ed 2d 439 (2005).[8] In that case, this *Amicus* argued that the heavy hand of *stare decisis* should be lifted for three compelling reasons:

> (1) The decision was based on *seriously flawed reasoning*—including errant assumptions about foundational cases and an anomalous

[7] There is little need to discuss whether *Lennane's* rule defies "practical workability." The rule is straightforward and easy to apply: only the Legislature can regulate wages paid to private employees.

[8] Brief *Amici Curiae* of NFIB Small Business Legal Center *et. al.*, *Ilagan v Ungacta*, 133 S. Ct. 1802 (2013), available at http://www.nfib.com/Portals/0/PDF/AllUsers/legal/Ilagan_Petition.pdf (last visited Mar. 3, 2015) (arguing that *certiorari* should be granted in part because the case presented an ideal vehicle to reconsider *Kelo's* controversial holding that governmental entities may invoke eminent domain powers to force a transfer of private property between private citizens or businesses).

departure from usual jurisprudential principles;

(2) The decision had generated widespread criticism among scholars, near universal condemnation in the court of public opinion, and repudiation in numerous state supreme courts; and

(3) The decision could be overturned without upsetting settled societal expectations "[b]ecause it was decided only a few years ago, [and] ha[d] [yet to] generated significant 'individual or societal reliance.'"[9]

Though *certiorari* was ultimately denied, *Amicus* stands by those arguments. To be sure, in an appropriate case—presenting similar compelling justifications—*Amicus* would urge this Court set aside a wrongly decided precedent. By contrast, in the present case, this Court is now considering whether to affirm or repudiate a 92-year-old decision that was decided consistent with prior precedent,[10] and for which there is no definitive basis for saying it was wrongly decided in the first place.

As this Court had recognized previously, the 1908 Constitution and the Home Rule City Act both conferred home rule authority with the same "general and indefinite words…" *McCabe*, 210 Mich at 217. Consistent with that decision, *Lennane* assumed the conferral of power over "municipal concerns" was necessarily limited in scope. Of course whether or not matters of labor and employment law should have been viewed as a matter of local concern, or of broader statewide concern might have been a difficult question when presented as a matter of first impression. But, there is certainly no basis for saying that *Lennane* drew the wrong line between

[9] Citing *Lawrence v Texas*, 539 US 558, 577; 123 S Ct 2472; 156 L Ed 2d 508 (2003) (emphasizing that *stare decisis* weighs heaviest when individuals or society has developed institutions or ordered their affairs in reliance on existing precedent).

[10] *See City of Kalamazoo v Titus*, 208 Mich 252, 262; 175 NW 480 (1919) (explaining that "while the state Legislature may exercise [a general police power]… local authorities can exercise [only] those [] which are expressly or impliedly conferred…"); *Gunther v Board of Rd Comm'rs of Cheboygan Cnty*, 225 Mich 619, 624, 626-627; 196 NW 386 (1923) (emphasizing local governments are agents of the state).

local and state concern.[11]

Considering the vagueness of the pertinent constitutional and statutory text, the worst that one can say is that *Lennane* might have been a close call. "[*I*]*f* a case was wrongly decided, the Court should *then* examine reliance interests... [and other pertinent factors]." *Rowland*, *supra*, 477 Mich at 215. Indeed, the presumption of *stare decisis* is at its height where the original decision appears defensible—especially where the decision has been accepted by the public as presenting a workable rule, upon which individuals and institutions have ordered their affairs for years already. *See* Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 Wayne L Rev 1911, 1914-17 (2009) (explaining that, as a threshold matter, the doctrine is only implicated if the Supreme Court believes a prior decision to be inconsistent with prior precedent).

"Stare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Robinson v* City of Detroit, 462 Mich 439, 463; 613 NW2d 307 (2000) (quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998)). As this Court recently found, the doctrine of *stare decisis* ultimately attempts "to balance two competing considerations: the need of the community

[11] The Defendant, City of Lansing has mounted its principal defense on the idea that the 1963 Constitution requires courts to liberally construe conferred home rule powers. But the text of the 1963 Constitution includes the very same substantive language as the 1908 Constitution in conferring only the power to regulate matters of "municipal concern." Cf Const 1908, Art VII, Sec. 21 with Const. 1963, Art VII, sec 22. Thus, the 1963 Constitution does not change the long recognized distinction between matters of local and statewide concern. *See National Credit Union Admin v First Bank Co*, 522 US 479, 501; 118 S Ct 927; 140 L Ed 2d 1 (1998) (invoking the canon of construction that similar language should be given the same meaning); see also Brudney & Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 Vand L Rev 1, 13 (2005) (explaining the canon of "pari material guideline, which presumes that similar statutes should be interpreted similarly and that [legislatures] use[] the same term consistently in similar statutes.").

for stability in legal rules and decisions and the need of courts to correct past errors." *McCormick v Carrier*, 487 Mich 180, 211; 795 NW2d 517 (2010). Of course, there is nothing to balance if the original decision was proper and reasonable; in such a case, the scales necessarily weigh in favor of affirmance. And, even assuming the original judgment was fairly debatable, decades of societal acceptance and reliance must overwhelmingly tip the scales toward affirmance. Yates, *Stare Decisis: Charting A Course in the Michigan Supreme Court of 2009*, 25 TM Cooley L Rev 463, 466 (2008) (suggesting that "precedents of more recent vintage are more susceptible to reversal than holdings that have 'deep historical roots.'").

Simply put, in order to overcome the presumption of *stare decisis*, one must make a compelling argument not only that the original decision was wrongly decided, but also that there are other exceptional reasons for overturning that decision at this juncture.

B. Attorney General Lennane Offered Compelling Reasons for Why Matters of Labor and Employment Law Are of Statewide Concern

Though consistent with prior precedent, *Lennane* was—to some extent—opaque in its explanation as to why matters of labor and employment law are of "state concern." Accordingly, *Amicus* submits that it may be helpful to consider the arguments advanced by the Attorney General in *Lennane*. Therefore, it has attached the Brief that Attorney General Lennane filed with this Court as Appendix A.[12] A review of this Brief may be helpful because this Court's opinion appears to have accepted the Attorney General's rationale *in toto*.

Indeed, the Court accepted the argument that: "Wherever a matter is of state wide importance and is *not strictly a matter which concerns only the locality*, it is for the state at large to speak, and not for the municipality." Appendix A, p 13 (emphasis added). In support of that proposed demarcation line between matters of state and municipal concern, Attorney General

[12] This brief is also available in the Michigan Law Library Archives.

Lennane pointed to a long line of cases holding that the "preservation of peace [and public health] ha[ve] always been regarded, both in England and in America, as [among] of the most important prerogatives of the state." Appendix A, pp 11-13 (quoting *People v Hurlbut*, 24 Mich 44, 82 (1871); *also* citing *Davock v Moore*, 105 Mich 120, 133; 63 NW 424 (1895) ("The reservation of the public health is not a local purpose, and the consent of the locality is not material, where the function is a public or general one."); and *Civil Service v Engel*, 184 Mich 269; 150 NW 1081 (1913).

The Attorney General's Brief emphasized that Detroit had usurped the exclusive prerogative of the Legislature in imposing new liabilities on contracting businesses. *See* Appendix A, pp 17-19 (observing that Detroit had "set[] up a cause of action that did not exist at common law and ha[d] not… been created by any statute of the State of Michigan."); *see also Hurlbut*, 24 Mich at 83 ("It is not the peace of the city or country, but the peace of the king or state that is violated by crimes and disorders. The prosecution is on behalf of the state."). Appendix A, p 12). The Attorney General further explained that:

> There is nothing in the Home Rule Act; there is nothing in the Constitution which would indicate the existence of the extraordinary power to fix a minimum wage being given to the municipality. As was pointed out in the argument, if it is done for social or economic reasons, these social and economic reasons would obtain as well in any other portion of the state. There is nothing peculiar about the climate or the conditions of Detroit which, as a matter of health, or a matter of economics makes it necessary to pay a given rate of wage, or the highest prevailing rate of wages, or to work only a given number of hours for the direct and indirect servants of the public.

Appendix A, p 14.

The plain implication is that it is for the Legislature alone—representing the collective will of the People of Michigan—to weigh various concerns over social and economic issues

because social and economic policies have broad and diffused impacts on the society at large. In accepting these arguments, the Court recognized that it is exclusively the Legislature's role to weigh competing public concerns over labor and employment policies. This is because only the State Legislature is presumed to adequately consider the full impact of such regulation. Indeed, municipal actors are charged with acting only in the interest of their local community: they will often fail to consider the broader implications to neighboring communities or the State itself.

To illustrate the principle in concrete 21st Century terms, a municipal decision to enact a $15 dollar per hour minimum wage ordinance, to require mandatory paid sick leave, or to impose other costly burdens on employers may well have state-wide impacts. Indeed, recent studies demonstrate that such municipal regulation can lead to increased rates of unemployment. See Yelowitz, *The Labor Market Effects of Citywide Compensation Floors: Evidence from San Francisco and Other "Superstar" Cities*, Employment Policies Institute (Oct., 2012) (reviewing the economic impacts of San Francisco's heightened compensation floors).[13] And of course, this predictably results in added strain on state-run social welfare programs, which results in unintended fiscal consequences to the State. So if Detroit or Lansing were permitted to adopt higher minimum wage laws, there would likely be impacts on the State's budget down the road. As such, it is more appropriate—as Attorney General Lennane argued in 1923—to find that it remains the prerogative of the Legislature to decide whether or not cede the power to enact labor and employment laws.

[13] *See* https://www.epionline.org/wp-content/uploads/2014/07/EPI_SanFrancisco_Studyv4.pdf (last visited Mar 5, 2015).

C. This Court Would Effect a Sea Change in Labor and Employment Law if it Should Reject *Lennane* After Nearly a Century of Legislative Acquiescence

1. Overturning *Lennane* Would Fundamentally Alter the Relationship Between Charter Cities and the State

Should this Court overturn *Lennane*, the decision would open a door that was closed by precedent nearly a century ago, and which neither the People nor the Legislature has seen fit to open.[14] Not only would it open the door for charter cities to regulate on matters of labor and employment law, but on a more fundamental level such a decision would amount to a reshuffling of political powers—upsetting the long understood balance between state and local government. As a leading commentator explains:

> It is very difficult to formulate a precise definition of home rule, inasmuch as there exists no unanimity of agreement among authorities concerning its meaning. … McBain defined it as the application of the federal principle to the state-local relationship. Viewed this way, it may be considered a device for allocating powers and functions between the state and its municipalities. It may also be considered both a legal and a political concept; legal in the sense that the allocation of powers and functions rests upon law; and political in the sense that it involves exercise of political judgment. … [A]s one author has suggested the aim of constitutional home rule is to alter the constitutional position of cities within the state, i.e. assure cities some powers independent of state legislative control.

Vanlandingham, s*upra* at 280.

Indeed, when the people of Michigan choose to adopt a home rule system, they expressly conferred the power to regulate on matters of "municipal concern." That grant of authority was understood at the time to preserve a certain realm of authority for charter cities—and a separate

[14] If indeed there is truly a public outpouring of concern over *Lennane's* rule, it should be for the Legislature—representing the collective will of the people of state—to address the issue.

sphere of exclusive state authority.[15] And in response to legitimate questions over the scope of power conferred *Lennane* made clear that matters of labor and employment law are definitively of "state concern"—and beyond the reach of municipal authorities. *Lennane*, 225 Mich at 641. Thus *Lennane* established a foundation principle in demarcating the contours of those conferred powers, and the nature of the state-local relationship. Without question, the decision has therein "become so embedded, [and] fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Robinson*, 462 Mich at 466.

For one, a reshuffling of the political order would—at this late juncture—raise a serious political controversy. Any reshuffling of political powers would inevitably spark vocal opposition from political minorities, and from other factions worried about the dilution of their

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[15] In this manner, Michigan's home rule system may be viewed as a state version of the federalist system. This is true in so far as the concept of federalism entails a notion that there are distinct spheres of political power that define the contours of the relationship between superior and subordinate political units. The comparison is appropriate also because, in both systems, the state (a) retains all residuary police powers, and (b) confers only specific powers upon another sovereign.

The key difference is that, within the federalist system, the state is the subordinate unit, whereas in the home rule system the state remains dominant over its political subdivisions. This matters immensely for the purpose of addressing potential conflicts between superior and subordinate political units in these respective models. Because the state is subordinate to the federal government, Michigan law must yield where there is an irreconcilable conflict. US Const, Art VI, Cl 2. And federal courts have developed a sophisticated analysis to determine when state law is therein preempted. *See Rice v Santa Fe Elevator Corp*, 331 US 218, 230; 67 S Ct 1146; 91 L Ed 2d 1447 (1947). But because charter cities are subordinate political units under Michigan law—and because the State alone wields a general police power, conferring only the limited power to regulate on matters of "municipal concern"—this Court has long recognized that charter cities simply lack the power to regulate on matters of statewide concern. *City of Kalamazoo*, 208 Mich at 262. Thus, when a charter city invades the exclusive purview of the state, its actions are *ultra vires*—and deemed void *ab initio*. *Id.* Importantly, there is no need for any preemption analysis because charter cities simply lack the power to act beyond those powers conferred. *Lennane*, 225 Mich at 641. A preemption analysis only makes sense to the extent the subordinate unit has been granted concurrent authority over the same subject matter.

political influence, or otherwise concerned that such fundamental changes might threaten their established interests. Further, such a decision would—as discussed more thoroughly *infra*—upset the longstanding expectation of unified statewide policies, which may well upset fundamental legislative presumptions reflected in existing statutory regimes.

Further, the displacement of unified statewide policies has "practical real-world" effects—which would necessarily weigh into the political calculus if the legislature were considering this issue on its own accord. Indeed, a departure from unified statewide labor and employment standards would spark fierce debates among different interest groups and from all points of the political spectrum. This underscores the point that any decision over the allocation of sovereign powers represents "an exercise of political judgment," which makes it all the more inappropriate for this Court to effect such change nearly a century after this issue was resolved by *Lennane*.

2. Balkanization Allows Dominant Municipalities to Establish De Facto Regional Standards—Which May Displace Labor and Disrupt State Policies.

If *Lennane* should be over ruled, charter cities would be enabled—for the first time in Michigan history—to enact law on matters that were previously understood as exclusively subject to uniform regulation at the state level. The most immediate result would be the balkanization of labor and employment standards.[16] This raises grave concerns for Michigan's small business community—especially for businesses with mobile workforces.

For example, should this Court dislocate the state's current uniform system of wage and

[16] Of course, the City's proffered logic would result in a wholesale usurpation of the state's police powers, which would enable charter cities to regulate on any conceivable subject—even to the point of establishing manufacturing standards for products sold within their jurisdictions. This would surely invade the state's regulatory prerogatives, as it would enable dominant cities, like to Detroit, to influence private conduct beyond its city-limits.

hour regulation, the result would enable larger municipalities to effectively set regional standards. This has already happened in California, Washington and other states that allow for balkanization of labor and employment standards. In those states, businesses with mobile employees—*e.g.*, repairmen, construction workers, painters—must either (a) painstakingly calculate various hourly rates, down to the minute, for time their employees spend in different local jurisdictions; or (b) conform to the most stringent regional standard in order to avoid the administrative burden of paying varying hourly rates. So in practical terms balkanization would force some companies to change their existing business models.

And as a practical matter, balkanization of labor and employment standards will predictably result in the displacement of labor—even for businesses with non-mobile workforces. Just as businesses may leave the state in search of a more favorable regulatory climate, they may likewise choose to move operations within the state. To be sure, if a business can operate more efficiently in Kalamazoo than in Lansing, it may rationally choose to invest in that community—perhaps even uprooting current operations. Of course this would accrue to the benefit of Kalamazoo residents, but would cause economic dislocation in Lansing and surrounding communities.

More concerning still is that such balkanization may ultimately drive business to invest or relocate to other states.[17] Should Detroit or Kalamazoo enact a living wage ordinance, mandatory paid sick leave, or other burdensome requirements, businesses may move to Ohio or Indiana.

[17] All residents have an interest in ensuring that Michigan remains competitive with neighboring states. Therefore, regardless of whether living in Saginaw or Whitefish, or in an unincorporated portion of the state, all Michiganders have an interest in the issue of whether municipalities should be allowed to disrupt unified regulatory policies.

And such concerns are all the more pressing in today's world of modern commerce.[18]

CONCLUSION

For the forgoing reasons, *Amicus* NFIB Small Business Legal Center respectfully requests that this Court reverse the Court of Appeal and reaffirm that *Lennane* remains good law.

Respectfully submitted,

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[18] As a result of improved transportation systems, and the revolution in digital communications, businesses can more easily relocate across borders. This only elevates concerns over how to best attract and retain business to Michigan.

APPENDIX A

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OCTOBER TERM 1923

STATE OF MICHIGAN

SUPREME COURT

ATTORNEY GENERAL, ex rel.
HAROLD A. LENNANE, et al.
Plaintiffs,

vs.

CITY OF DETROIT,
Defendants.

BRIEF FOR PLAINTIFFS

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CONWAY BRIEF COMPANY
DETROIT, MICH.

STATE OF MICHIGAN

SUPREME COURT

ATTORNEY GENERAL, ex rel.
HAROLD A. LENNANE, et al.
Plaintiffs,

vs.

CITY OF DETROIT,
Defendants.

BRIEF FOR PLAINTIFFS

STATEMENT OF FACTS

As a statement of facts, and of the legal questions involved, we quote from that portion of the opinion of the Circuit Judge:

> "The Bill of Complaint in the above entitled cause is filed by Merlin Wiley, Attorney General of the State on relation of Harold A. Lennane, Julius Porath, John A. Mercier and George R. Cooke, citizens of and doing public contract work in and for the City of Detroit, to test the validity of Chapter II of Title IX of the Charter of the City of Detroit, known and designated as the "Minimum Wage Law", and also the Ordinance passed by the Common Council to make the said Charter provision effective.

"The defendant, City of Detroit, is a municipal corporation, organized under and in pursuance of the provisions of Act 279 of the Public Acts of the State of Michigan for the year 1909, as amended, known as the "Home Rule Act", enacted by the Legislature of the State to carry into effect the mandate of the State Constitution as embodied in Sections 20 and 21 of Article VIII thereof, which read as follows:

> Section 20. "The Legislature shall provide by general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts."
>
> Section 21. "Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws and ordinances, relating to its municipal concerns, subject to the constitution and general laws of the State."

"Under the Home Rule Act, so-called, every city Charter MUST contain certain enumerated provisions; there are others that it must NOT contain. The Minimum Wage provision in the Charter of the defendant City of Detroit, is not one of those which the Home Rule Act requires; it is not one of those that are prohibited by the Act, nor is it one, that, in terms, is permitted to be included by

the Act. If, then, there is any authority for its being included in the Charter at all, it must be found in Sub-Division "t" of Section 4 of the Home Rule Act, which provides:

> "For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers are enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this State."

"With this provision of the Home Rule Act in mind, the framers of the Charter for the City of Detroit included under the head of "Miscellaneous Provisions" Chapter II Title IX, as follows:

> Section 1. "The service day for all employes of the City of Detroit during which they shall be required to work shall consist of eight consecutive hours in any one day of twenty-four hours. No employe shall be required or permitted to work for more than this eight hour service day, except in case of any emergency which would result in serious loss, damage, or impairment of the city's service, unless the same employe or employes were required to remain continuously at work for a longer period, in which case, during the

continuance of the emergency, the provision requiring the eight-hour service day may be suspended by the department head or proper subordinate in whose department the emergency shall have arisen."

Section 2. "No employe shall be required to work for more than six service days in any consecutive seven days of twenty-four hours each, except in case of any emergency which would result in serious loss, damage or impairment of the city's service, unless the same employe or employes were required to remain at work in excess of the six-day service week, in which case, during the continuation of the emergency, the provision requiring a six-day service week may be suspended by the department head or proper subordinate in whose department the emergency shall have arisen."

Section 3. "The common council shall by ordinance provide for the proper readjustment of service time and for the proper excess compensation of any employe of whom service in excess of the regular service day or the regular service week shall have been required in the case of any emergency, as herein provided. But the common council shall provide for a rate of compensation for excess service which shall be for Sundays and other holidays not less than twice the regular rate of compensation, and for other days not less than one and one-half the regular rate of compensation.

Section 4. "No employe doing common labor shall receive compensation in a sum less

than two dollars and twenty-five cents per diem for an eight-hour service day. No employe doing the work of a skilled mechanic shall receive compensation in a sum less than the highest prevailing wage in that particular grade of work. Whenever practicable, the per diem plan of employing common labor shall be in force. Any employe who shall receive compensation for service rendered at a rate less than the minimum fixed herein may by an action for debt recover from the city the balance due him hereunder with costs."

Section 5. "No contract for any public work shall be let which shall not, as a part of the specification on which the contractors shall make their bids, require the contractor or subcontractor to pay all persons in his employ doing common labor and engaged in the public work contracted for not less than two dollars and twenty-five cents per diem, to pay all persons in his employ doing the work of a skilled mechanic and engaged on the public work the highest prevailing wage in that particular grade of work, and to require of such employes the same service day and service week required herein of all city employes. Any contractor who shall have entered into such contract with the city and shall have violated any provision of this section as made a part of his contract shall be debarred from any further contracts for public work, and any contract let to him contrary to this provision shall be void. Whenever it shall appear that any employe of any

contractor for public work engaged thereon shall have received less than the compensation herein provided, the common council may cause to be paid to him such deficit as shall be due him and shall cause the amount so paid to be deducted from the balance due to the contractor from the city."

"The Charter, including the Minimum Wage provision, was adopted by the electors of the City of Detroit, on the 25th day of June, 1918, and took effect on the 27th day of June, 1918. On the 3rd day of January, 1922, the Common Council passed an ordinance to carry out the Minimum Wage provision of the Charter. This ordinance contains little not provided for in Charter.

"So far as the allegations of fact are involved or are important in the consideration of the legal questions raised by the pleadings and the proofs taken thereon the record discloses:

"That, from the re-incorporation of the city of Detroit under the Home Rule Act, in June, 1918, until on or about the time of the passage of the ordinance in question in this case, in the month of January, 1922, although the provisions of Chapter II of Title IX were made a part of the specifications of and for every project of public work upon which contractors were asked to submit bids and were included in and made a part of the contracts when let, the city had made no serious or systematic attempt either to observe the provisions itself or require their fullfillment by private contractors; that in making their bids, contractors

were given to understand by the agents of the city that they could bid on the proposed public works without reference to the Minimum Wage provision of the Charter; that the contractors made their bids accordingly and in carrying on the contracts received made their own arrangements with their men with satisfaction to all concerned;

"That the City, in carrying on the work in its various departments, has complied with the Minimum Wage provisions of the Charter only when it has been convenient or readily feasible to do so; that, while these provisions, in terms, apply to all employes of the City, yet, through advised elimination they are now held to apply only to workmen in certain classes of employment;

"That, it has been found by actual practical experience on the part of the City that, when the eight hour day provision has been attempted in certain of the departments of public work and as applied to parts of the work let to contractors, it has proved impracticable, unworkable and, if attempted to be carried out as called for, would result in largely increasing the cost of public works and add largely to the expense of maintaining the various departments of the city government;

"That the over time worked and paid for by the city, partly in compliance with the Minimum Wage provision and partly without reference to it, has not resulted from any "emergence" within any recognized definition of that term but by reason of the impracticability of the provisions applied to certain departments of public work; that the

city has paid this unearned-increment, or penalty, for permitting over time to be worked, not as an emergency matter, but in open violation of the very spirit and intent of the provision of the Minimum Wage Law, which is to create by governmental fiat a job for another man after the first man has worked his eight hour shift;

"That, at the time of the commencement of this suit, there were outstanding contracts between the city and private contractors that were entered into at a time when it was not the policy of the city to enforce the provisions of the Minimum Wage Law, and that it would work a hardship upon such contractors to be compelled to carry out the terms of that provision now;

"That neither the health of the workmen, either common laborers or skilled mechanics, nor the health of the public, nor the morality of the people, nor the safety of the public is involved as a determining factor in this case;

"That the common council from year to year had in mind in fixing its annual budget the provisions of the Minimum Wage Law;

"That the Charter of the city authorizes the Commissioner of Public Works to bid on public projects in competition with private contractors and requires that contracts shall be let to him in case he shall be the lowest bidder;

"That the Charter requires that all contracts for public work, involving an expenditure of Five Hundred Dollars and upwards shall be let to the lowest responsible bidder.

"Under the record in the case as above outlined and determined, the plaintiff claims, as a matter of law, that he is entitled to the relief prayed for in his bill for three primary reasons:

1. Because the inclusion of Chapter II of Title IX in the Charter of the City of Detroit was in excess of the authority conferred upon the municipality and is therefore ultra vires.

2. Because the provisions of such Chapter are in violation of the Constitution of the United States.

3. Because the provisions of said Chapter are contrary to the provisions of the Constitution of the State.

ARGUMENT

We will discuss the legal questions in the order given above.

I.

The Charter and Ordinance provisions are ultra vires.

Cities of Michigan owe their origin and powers to the Constitution and statutory law of the State. The present constitution recognizes as former constitutions have recognized the general control of the legislature over them.

Kalamazoo vs. Titus, 208 Mich. 252, 265.

It is elementary that every city, in the exercise of its powers, must find authority for its conduct under one of three heads.

1. Within the express provisions granted it.

2. Incidental to the express provisions granted it.

3. Not merely convenient, but absolutely indispensable for the purposes and objects of the corporation.

Taylor Street Ry. Co., 80 Mich. 77, 82.

It cannot be nor is it claimed that the power here employed is included in the first or third class above mentioned. It is, however, claimed to arise incidentally under the language of subdivision "t" of Section 4 of the Home Rule Act, which reads as follows:

(Section 4. Each city may in its charter provide:)

"t For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the Constitution and general laws of this State."

Subdivision "t" was subdivision "s" of Section 4 of the original Act of 1909. The section was an enumeration of powers, "s" was its last subdivision. Its language is general and indefinite and contains words of apparently broader scope, hence its meaning is limited and qualified by the express enumeration which precedes it.

Board of Education vs. Detroit, 30 Mich. 505, 509.
Brooks vs. Cook, 44 Mich. 617, 619.
Roberts vs. Detroit, 102 Mich. 64, 67.
People vs. Shurly, 124 Mich. 645, 647.
People vs. Jacobs, 184 Mich. 77, 83, 84.

If this extraordinary attempt at legislation is to be justified under such general language, it at least must be classed as a "Municipal concern", that is among those things which are primarily within the jurisdiction of municipalities. The words "municipal concerns" are taken from Section 21, Article 8, of the Constitution, and it is needless to say that even the legislature could not give to them a broader meaning than that instrument.

This meaning is made clear from previous decisions of this Court:

Matters of policing for the prevention of crime and the protection of property, are not municipal concerns.

People vs. Hurlbut, 24 Mich. 44.

(page 80) "The only remaining question, therefore, concerning the application of our former decision to this case is, whether the police board is a state or municipal agency. If the former, that decision concludes nothing now before us. If the latter, it ends one important part of this controversy. I think it is clearly an agency of the state government, and not of the municipality."

(page 82) "The preservation of the peace has always been regarded, both in England and in America, as one of the most important preroga-

tives of the state. It is not the peace of the city or county, but the peace of the king or state that is violated by crimes and disorders. The prosecution is on behalf of the state. The trial is before tribunals created and regulated by the state. The remission of punishment is by the government of the state. Our constitution confides the judicial power to no courts but those organized under the direct sanction and regulation of state law. No portion of this power can be delegated to cities."

(page 83) "The general purposes of the police act were such as appertain directly to the suppression of crime and the administration of justice. There is, therefore, no constitutional reason for holding it to be other than a regulation of matters pertaining to the general policy of the state, and subject to state management."

(pages 102-103) "For those classes of officers whose duties are general, such as the judges, the officers of militia, the superintendents of police, or quarantine and of ports, by whatever name called—provision has to a greater or less extent, been made by state appointment. But these are more properly state than local officers; they perform duties for the state in localities, as collectors of internal revenue do for the general government; and a local authority for their appointment does not make them local officers when the nature of their duties is essentially general."

Matters of health are not "municipal concerns".

Davidson vs. Hine, 151 Mich. 294.
Civil Service vs. Engel, 184 Mich. 269.

In *Davock vs. Moore,* 105 Mich. 120, I quote from page 133 the following:

> "It is said that the act is unconstitutional, in that it authorizes the board of health to require money to be raised by an annual tax for local purposes without the consent of any of the local officers or of the boards of said city. The preservation of the public health is not a local purpose, and the consent of the locality is not material, where the function is a public or general one."

These decisions are quoted for the purpose of demonstrating that all matters that are left in charge of a municipality, are not necessarily municipal concerns, and that every municipality has a dual character, in the one it represents the state as an agency of the state, and in the other it represents the locality and the inhabitants thereof. Wherever a matter is of state wide importance and is not strictly a matter which concerns only the locality, it is for the state at large to speak, and not for the municipality.

It probably would not be possible to more emphatically denote the lack of "municipal concern" in health matters, than to consider the result of *Civil Service vs. Engel,* supra. In 1913 the City of Detroit amended its charter and created a Civil Service Commission under which it attempted to place all employes paid from its treasury, on a civil service standing. The Health Board employed

a man named Lee, without his having taken the examination provided for by the Civil Service Act. The Civil Service Commission asked the controller to decline to pay Lee's salary. This he refused to do and it brought mandamus proceedings against him. The Court held that the writ should not issue, and in the first paragraph, after the statement of the fact, states beyond cavil that matters of health are state and not municipal concerns.

There is nothing in the Home Rule Act; there is nothing in the Constitution which would indicate the existence of the extraordinary power to fix a minimum wage being given to the municipality. As was pointed out in the argument, if it is done for social or economic reasons, these social and economic reasons would obtain as well in any other portion of the state. There is nothing peculiar about the climate or the conditions of Detroit which, as a matter of health, or a matter of economics make it necessary to pay a given rate of wage, or the highest prevailing rate of wages, or to work only a given number of hours for the direct and indirect servants of the public.

The misapprehension of Detroit with respect to its power, and the misapprehension of many other cities in this same regard, is very thoroughly set forth by the court in *Kalamazoo vs. Titus,* 208 Mich. 252. The importance of this case upon a controversy of this kind becomes apparent when you consider the position taken by the City. Under the impression that Michigan no longer viewed its municipalities as corporations with limited powers, but by the new Constitution had taken the legislative counsel over them away, and lodged it in

the electors of each locality, that the words "municipal concerns", meant the doing by the municipality of anything that it saw fit to do which would not contravene express provisions of the State or Federal Constitution, Detroit and other cities have tried to give cities very wide latitude in legislating. The fallacy of this view will probably never be any better put than it has been in this case.

Let us quote this paragraph from page 260:

> "The charter provision, the ordinance, the argument made for the city, indeed, the suit itself, reflect a popular interest in, and, we conceive, a popular misunderstanding about the subject of home rule, so-called, in cities. There is apparent a widely spread notion that lately, in some way, cities have become possessed of greatly enlarged powers, the right to exercise which may come from mere assertion of their existence and the purpose to exercise them. Whether these powers are really inherent in the community, but their exercise formerly was restrained, or are derived from a new grant of power by the State, or may be properly ascribed to both inherent right and to a new grant, are questions which do not seem to bother very much the advocates of the doctrine that they in any event exist. On the other hand, there is expression of grave doubt whether, in the view of the law, there has been any enlargement or extension of the subjects of municipal legislation and control or of the powers of cities except as those subjects and powers are specifically enumerated and designated in the Constitution itself and in the Home Rule Act."

Also this from page 265:

> "With regard to the subject we are considering, the impressive thing about these constitutional provisions is that they recognize and affirm the theory that cities owe their origin and their powers to the legislature. And while cities may refer power to do some things, as, for example, power to acquire certain public works, directly to some of these constitutional provisions, it must be admitted that all of these provisions should be considered with reference to the fact legislative power is vested in the legislature and that the Constitution recognizes, as former Constitutions have recognized, the general control of the legislature over cities. That the legislative power ought to be exercised in such manner as to preserve the right of local self-government is a doctrine which in application in no way modifies or qualifies the idea of the general legislative power of creation and control."

ILLUSTRATIONS FROM THE CHARTER.

Illustrating the ultra vires character of this attempted legislation, consider the proposed right of action given by Section Four.

> "Any employe who shall receive compensation for service rendered at a rate less than the minimum fixed herein may by action for debt recover from the city the balance due him hereunder with costs."

It is common knowledge that each time an employe receives his pay from the city, he is required to sign a pay roll which states that he is paid in full to the time fixed on the pay roll. This system was in use many many years before Detroit began operations under its revised charter, and in some form each man who received money from the city, must in writing acknowledge the receipt of that money, and yet, while with one hand the employe acknowledges that the city owes him nothing, with the other, under this Section, he may begin an action in assumpsit against the municipality. Thus is a debt created not by express, not by implied contract; a debt that does not grow out of the dealings between the city and its employees, but is one that grows out of, and is created solely by this provision of law. Who empowered Detroit to say what, under certain circumstances, would constitute such an action for debt? Where does it get this comprehensive power that it assumes unto itself?

A further illustration of the ultra vires character of this attempted legislation, immediately occurs in paragraph five. The Home Rule Act, Section 4, Sub-section "e", provides:

> "For the punishment of those who violate its law or ordinances, but no punishment shall exceed a fine of five hundred dollars or imprisonment for ninety (90) days, or both in the discretion of the court; said imprisonment may be in the county jail or city prison, or in any workhouse in the state authorized by law to receive prisoners from such city."

In Section five of the minimum wage chapter occurs this:

> "Any contractor who shall have entered into such contract with the city and shall have violated any provisions of this section as made a part of his contract shall be debarred from any further contracts for public work."

Here the violation of this section is to be punished by being debarred from participating in any further public work. A manifest punishment, and one different from that desscribed in the Home Rule Act. If the city may in this respect deviate from the requirements of the Home Rule Act, what will check it?

A final illustration grows out of the last sentence of this paragraph. For convenience we repeat it:

> "Whenever it shall appear that any employe of any contractor for public work engaged thereon shall have received less than the compensation herein provided, the common council may cause to be paid to him such deficit as shall be due him and shall cause the amount so paid to be deducted from the balance due to the contractor from the city."

From this arises one of two propositions. It means, if a judgment has been obtained in a regular court of law the common council may act. In such a case the judgment would be based on the action given by the law, a debt created not by contract, express or implied, but growing out of the law. If it does mean this, Section 5, like Section 4, sets up a cause of action that did not exist at common law and has not, up to the present time, been created by any statute of the State of Michigan.

If it does not mean this, then it means that the common council ex-parte, or as it sees fit, may try the dispute between the contractor and the employe and give to the one the property of the other. This would be void because it would amount to the taking of property without due process of law.

The judicial power of the State of Michigan, even under the last Constitution, is lodged in the Supreme Court, and in the Circuit Courts, Probate Courts, Justice of the Peace, and such other courts inferior to the Supreme Court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house.

If the common council of the City of Detroit is the tribunal fixed by this section to try this controversy, give judgment and execute the judgment by turning over the money of the one to the other, it certainly is exercising judicial power and would violate the last provision of the Constitution of Michigan, just referred to.

II.

Does the Charter Chapter violate the Federal Constitution?

At the very outset of this inquiry, you are met with the case of

Atkins vs. Kansas, 191 U. S. 207.

Considerable space and thought would have been necessary, in the analysis of this opinion, if the U. S. Supreme Court had not disposed of it in

On page 400 the court said:

> "A law forbidding work to continue beyond a given number of hours leaves the parties free to contract about wages and thereby equalize whatever additional burdens may be imposed upon the employer as a result of the restrictions as to amount of wages. Enough has been said to show that the authority to fix hours of labor cannot be exercised except in respect of those occupations where work of long continued duration is detrimental to health. This court has been careful in every case where the question has been raised, to place its decision upon this limited authority of the Legislature to regulate hours of labor and to disclaim any purpose to uphold the legislation as fixing wages, thus recognizing an essential difference between the two. It seems plain that these decisions afford no real support for any form of law establishing minimum wages."

The distinction between these two class of cases being established by the court, the inquiry remains: Is the Atkins vs. Kansas case one in which the question involved was the "hours of labor?"

This was a criminal case; the accused was in court on a complaint which contained two counts. In the first he is charged with having required a workman to "labor more than eight hours per day." In the second he is charged with having required a workman to entitle him to the current wages to labor therefor "more than eight hours per day."

Atkins vs. Kansas, 191 U. S. 207, 209.

No other question is considered in the opinion and in consequence this case, insofar as it touches on the "hours of labor" as distinguished from the "minimum wage," is as to the latter inapplicable.

Adkins vs. Children's Hospital, Supra.

However, this does not entirely dispose of it and a further consideration will be given it subsequently. With this qualification in mind, we assert that the board question of the validity of legislation on a minimum wage has been disposed of by the *Adkins vs. Children's Hospital,* Supra.

III.

Does the Charter Chapter violate the Michigan Constitution?

Under this heading we desire to revert to *Atkins vs. Kansas, Supra.* In doing so it must be borne in mind that under the previous heading as well as under this the assumption is present that the legislation in question in both cases referred to was that of the supreme legislative body and not that of a limited and restricted body like, under our constitution, "the electors of each city."

The question then is: May the supreme legislative body under our system arbitrarily decide what shall be the wage for work impressed with a public character? While this question as stated is not involved in this litigation,

it is certain that if this body, because of the limitations in our constitution might not do this, the restrictions which apply to it will apply with equal force to the "electors of each city."

In the last paragraph of his opinion Mr. Justice Harlan says:

> "We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done."

The first impression received from this language is that a similar exercise of power in Michigan could not be questioned.

But when the statement is weighed, it is seen that it goes too far. Our legislature has never been allowed to exercise arbitrary power over municipalities except in matters which are of state concern as distinguished from municipal concern. Over questions of police and health, as illustrations, the supreme power of the legislature has not been questioned and municipalities have been made to conform to the wishes of the state, if those should be opposed to the local wishes. This is so, because the police power in its fulness is lodged in this body, and its regulation for the prevention of crime or the promotion of health is not to be circumscribed by the delegated police power which it bestows on localities. All public work or all public em-

ployment, however, has not to do with these subjects. The local public treasury in its last analysis is a trust fund to be distributed with honesty and integrity for the general public good. In affairs not public, men may do with their money practically as they see fit to do. They may give it away, dissipate it, or bestow special consideration on a few. The funds of the public are not thus owned and may not be treated in this way. It would be preposterous to say that the legislature could compel public money to go to the highest responsible bidder. In morals as well as in law, when the public is concerned, for what is given there must be received a reasonable equivalent. If over and above this reasonable equivalent the legislature may bestow a bonus or grant a gratuity, it is as surely taking the property of one and bestowing it upon another as if this was openly done. If government through its legislation may do this, then it is not "instituted for the equal benefit, security and protection of the people," but for the benefit of those who may acquire legislative favor.

Here without any question of health, police or morals, the public funds are ordered distributed in an arbitrary manner for the purpose of accomplishing for those designated, (necessarily a few, when compared with the whole community) a benefit without regard to the equivalent received.

This we submit is legislation which violates not only the Fourteenth Amendment to the Federal Constitution, but is distinctive of the principal of equality found in Section 1 of Michigan's Bill of Rights and of the due process clause of Section 16 of the same article.

The decree should be affirmed.

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